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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

THOMSON PHOSPHATE COMPANY,
Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Atlantic Coast Line Railroad Company, et al. (hereinafter referred to as ACL) respectfully prays that a writ of certiorari issue to review the final judgment and the opinion of the Court of Appeals for the Second Circuit, entered on November 24, 1970.

Opinions and Orders Below

On May 20, 1968, the District Court for the Southern District of New York entered partial summary judgment in favor of petitioners on ACL's motion to set aside and

annul the reports and orders of the Interstate Commerce Commission in *Thomson Phosphate Company* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 and 311 I.C.C. 315, and remanded said reports and orders to the Commission for action consistent with the opinion of the Court. The reports and orders of the Commission are set forth in the appendix hereto (pp. 4a-17a). The opinion and order of the Court is set forth at pages 30a-52a thereof.

On November 24, 1969, the District Court for the Southern District of New York, in an unreported opinion, denied ACL's motion to set aside and annul the Report and Order of the Interstate Commerce Commission on Reconsideration, 332 I.C.C. 691. Copies of the opinion and order of the District Court and of the report and order of the Commission are set forth in the appendix hereto at pages 60a-62a and 53a, respectively.

On June 8, 1970, the District Court entered judgment in favor of Thomson in the amount of $6,469.32, together with an attorney's fee in the amount of $2,156.44 for Thomson's attorney.

The opinion of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, has not yet been reported. A copy thereof is set forth in the appendix (pp. 63a-68a).

A copy of the order of the Court of Appeals for the Second Circuit, dated January 4, 1971, denying ACL's timely petition for rehearing, is set forth in the appendix (p. 69a).

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is November 24, 1970. It was entered on the same day. A copy of that judgment is appended hereto at page 63a.

The date of the order of the Court of Appeals denying ACL's petition for rehearing is January 4, 1971. A copy of that order is appended hereto at page 69a.

This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1).

Question Presented

Was the Commission without jurisdiction to consider Thomson's complaint (Docket 32065) because Rule 1.25(f) of the General Rules of Practice Before the Commission, like Section 16(3) of the Interstate Commerce Act, is jurisdictional, and failure to comply strictly with the provisions thereof deprived the Commission of jurisdiction to consider the complaint.

Statutory Provisions Involved

The statutory provisions which this case involves are the Interstate Commerce Act, as amended, 49 U.S.C.A. § 16(3)(b), 49 U.S.C.A. § 17(3), and Rules 25(e) and 25(f) of the General Rules of Practice Before the Commission, 49 U.S.C.A. App. 283 and U.S.C.A. App. 283-284, respectively.

Statement of the Case

A. The Facts.

On May 10, 1946, Thomson Phosphate Company (hereinafter referred to as Thomson) filed an informal complaint with the Interstate Commerce Commission (hereinafter referred to as the Commission) seeking reparation on an undisclosed number of carload shipments of phosphate rock from Prairie, Fla., to all destinations in Illinois, alleging that the applicable rates were unreasonable, in violation of Section One of the Interstate Commerce Act. Thereafter ACL wrote the Commission offering to dispose

of the informal complaint by making reparation "as to all shipments involved in this informal complaint upon which the statute of limitations has not run * * * by observance of the basis fixed by the Interstate Commerce Commission in the *Diamond Fertilizer Case,* 256 I.C.C. 747; 259 I.C.C. 75", a basis somewhat higher than that sought by the complaint. The Commission submitted ACL's compromise offer to Thomson, who advised the Commission that "the complainant is agreeable to the offer of adjustment made by the carriers in the matter". ACL thereupon prepared a special docket application seeking Commission authority to make reparation on the agreed basis. The application was executed by all participating railroads and Thomson, and submitted to the Commission which subsequently issued an order authorizing and directing ACL to make reparation on the compromise basis set forth in the application. ACL promptly complied with the Commission's order.

After accepting payment on the compromise basis, Thomson shortly thereafter requested ACL to make reparation on the basis originally sought by the informal complaint on those shipments on which reparation had not been made because the applicable charges were lower than those which would have accrued under the compromise basis, and thus were not entitled to reparation under that agreement. When ACL declined to make any further informal reparation, Thomson filed a formal complaint with the Commission (Docket No. 31124) alleging that the rates and charges assessed on 71 carload shipments from Prairie, Fla., to five specified destinations in Illinois were unreasonable, in violation of Section One of the Act. The complaint stated that the matter had been the subject of the informal complaint heretofore referred to. Some two months later Thomson requested the Commission to reopen the informal complaint, except as to the five destinations covered by the formal complaint, and the Commission's staff complied with that request. The Commission found the rates assailed in Docket No. 31124 unreasonable and

awarded reparation on a basis lower than the compromise basis agreed to by ACL and Thomson to dispose of the informal complaint.

About two years later Thomson again requested ACL to make informal reparation "on the shipments to the remaining Illinois destinations", but ACL declined to do so on the ground that the informal complaint was barred by the statute of limitations and Rule 25(f) of the General Rules of Procedure Before the Commission. On several subsequent occasions Thomson requested the Commission to reopen the informal complaint, and the Commission's staff granted each request, only to have ACL decline to change its contention that the informal complaint was barred. Eventually Thomson filed another formal complaint with the Commission (Docket No. 32065) alleging that the assailed rates were unreasonable. The complaint stated that the matter had been the subject of the same informal complaint heretofore referred to.

A report proposed by the hearing examiner set forth in chronological order and in greater detail the facts hereinbefore stated. The report pointed out that Rule 25(f) of the General Rules of Practice Before the Commission provides, among other things, that when an informal complaint cannot be settled informally the complaint is allowed an additional six months within which to "resubmit the informal complaint 'on an additional fact basis' ", a provision which had not been complied with. The examiner accordingly concluded that ACL made Thomson a compromise offer which was accepted without reservation, that "the contract resulting" was in fact approved by the Commission when it issued its order of September 19, 1950, based on the special docket application submitted to it, that a study of the situation on September 19, 1950, led only to the conclusion that the informal complaint had been satisfied and that no further complaint was pending. The examiner pointed out that "the limitation provided by Section 16(3) of the statute is jurisdictional and cannot be waived

by the Commission or its staff", and proposed that "The Commission should find that consideration of the rates assailed is barred by the statute of limitations provided in section 16 of the act".

The Commission reversed the examiner, without discussing the legal effect of the compromise settlement. It did discuss Rule 25(f), including its requirement for the resubmission of an informal complaint only "on an additional fact basis". It stated that the filing of Docket No. 32065 was "seemingly" in conformance with the "six months rule", and after discussing several "reopenings" and "closings" of the informal complaint concluded that the complaint was not barred and awarded reparation. On further hearing the Commission found Thomson entitled to reparation, with interest, and by order dated September 28, 1960, authorized and directed ACL to pay Thomson $8,889.76, with interest. Commissioner Walrath dissented on the ground that the complaint was barred by the statute of limitations.

On reconsideration (upon remand) the Commission concluded that its order of September 19, 1950, "authorized the railroads to pay reparation on 185 specifically enumerated shipments" and "That order did not by its terms authorize the railroads or the complainant to compromise any other claims that might be outstanding". It thereupon ordered ACL to pay Thomson $3,802.75, with interest from October 16, 1956.

B. Prior Proceedings.

These proceedings are the direct result of the decision of this Court in *ICC* v. *Atlantic Coast Line R. Co.*, 383 U. S. 586.

On September 6, 1961, ACL filed a complaint in the United States District Court for the Southern District of Florida, Jacksonville Division, under the provisions of 28 U.S.C.A. § 1336 and 1398, and Section 17(9) of the

Interstate Commerce Act, 49 U.S.C.A. § 17(9) seeking to enjoin, set aside and annul reports and orders of the Commission in the complaint proceeding before it. In its decision that Court (213 F. Supp. 199), made numerous findings of fact and conclusions of law in favor of ACL, including the conclusion that Section 16(3)(b) of the statute destroys the right as well as the remedy, that it is jurisdictional and limits the power of the Commission to consider a complaint, that accordingly Rule 25(f) must also be strictly construed, and that because of the failure of the several requests by Thomson to the Commission to reopen the informal complaint to include the "additional fact basis" required by Rule 25(f) the complaint was barred because the informal complaint could not have been reopened by the Commission under Rule 25(f).

The Commission appealed that decision to the Court of Appeals for the Fifth Circuit solely on jurisdictional grounds. It did not challenge the validity of the findings of fact or conclusions of law made by the Florida District Court. The Court of Appeals affirmed the action of the District Court in overruling the Commission's motion to dismiss for lack of jurisdiction, 334 F. 2d 46 (1964).

However, this Court granted certiorari because of the importance of the question in the administration of the act (383 U. S. 576) and reversed the judgment of the Court of Appeals, holding that "when the Commission issues a reparation order, not accompanied by a cease and desist order, a carrier may obtain review of the Commission's order only in the court where the shipper commences its enforcement action". The Court also stated that the first adjudication will generally be persuasive but, if not, conflicting decisions may be reviewed in this Court.

C. The Proceedings Below.

On or about August 22, 1962, almost a year after ACL filed its judicial review action in the Florida District Court

and only five days before the expiration of the one-year statute of limitations for the filing of an enforcement action, Thomson filed an enforcement action in the District Court for the Southern District of New York. By stipulation all proceedings therein were held in abeyance pending the decision by the Florida District Court in the action pending in that court.

On November 10, 1966, based on the aforesaid decision of this Court, ACL filed a cross-complaint in the District Court for the Southern District of New York under the provisions of 28 U.S.C.A. § 1336 and 1398, and Section 17(9) of the Interstate Commerce Act, 49 U.S.C.A. § 17(9), seeking to enjoin, set aside and annul the reports and orders of the Commission for substantially the same reasons alleged in the Florida District Court action. ACL's cross-complaint was consolidated with Thomson's enforcement action, and by stipulation it was agreed that the disposition of the enforcement action would be governed by the outcome of ACL's cross-complaint.

ACL filed a motion for summary judgment, as a result of which the District Court failed to make the same findings of fact and conclusions of law made by the Florida Court. The Court noted that the examiner found on the basis of evidence before him, including the record of compromise negotiations, that ACL's compromise offer was made and accepted in full settlement of the informal complaint, and concluded that the informal complaint had ceased to exist more than six months before any further action was taken by Thomson so that any claims that might have survived the compromise settlement were barred by the statute of limitations. The Court pointed out that neither Thomson nor the Commission point to any findings or basis, evidentiary or otherwise, supporting the Commission's reversal of the examiner and its conclusion that the informal complaint remained pending with respect to additional shipments.

The Court thereupon concluded "that the record fails to reveal substantial evidence supporting the Commission's reversal and contrary conclusions."

With respect to ACL's contentions concerning the effect of Rule 25(f), the Court concluded that the Commission did not err in rejecting ACL's contention that the several "reopenings" must be treated as a nullity, which would have the effect of barring the 1956 formal complaint, on the ground that the Commission's decision turns on its liberal rather than literal construction of the term "additional fact basis" in Rule 25(f), adding that it would be "unfair" to the complainant to hold that its claims were barred by the statute of limitations "because there was not a sufficient basis for reopening".

However, the District Court granted partial summary judgment on the ground that under a contract of sale to another company Thomson reserved only the right to assert freight charge claims with respect to shipments between January 1, 1948, and December 31, 1950, and also on the ground that the Commission had abused its discretion in awarding interest for the period prior to the filing of Formal Complaint No. 32065 on October 16, 1956. The Court modified the order of the Commission accordingly, and as so modified remanded the case to the Commission to determine whether the compromise agreement and payment of $13,171.98 by ACL constituted full settlement of the informal complaint.

Following receipt of the report of the Commission on remand, ACL filed a second motion for summary judgment seeking to enjoin, set aside and annul that report and order. The District Court denied the motion, concluding that for the "reasons" stated by the Commission, ACL's payment, notwithstanding their characterization of the compromise offer, did not discharge claims for reparation with respect to shipments other than those specified in the Commission's special docket award. The Court also pointed

to the Commission's statement that "carriers are not free to negotiate settlement on the basis of part payment of some claims, since such a procedure would preclude Commission determination of alleged *overcharges,* on undisclosed shipments and permit carriers to avoid their legal obligations with respect to tariffs due on the latter shipments simply by not advising the Commission of such claims." (Italics added)

D. The Second Circuit Opinion.

The Court of Appeals, merely referring to the initial decision of the District Court, stated that in an unreported decision, dated November 24, 1969, the District Court found that "there was substantial evidence in the record to support the supplemental position of the Commission". Noting that the Interstate Commerce Act invests the Commission with broad responsibility to police tariffs and rebates, the Court of Appeals concluded that the District Court found "substantial evidence" in the record to support the Commission's decision, and concluded that it could not say that conclusion was clearly erroneous within the meaning of Fed. R. Civ. p. 52(a).

Although conceding that ACL pointed to several instances when it asserted that Thomson's claim expired, the Court states "the most important contention" concerns the closing of Thomson's informal complaint in March, 1956, and the delay of more than six months in the filing of a formal complaint. Quoting Rule 25(f) the Court stated that the rule tolls the running of the two year statute of limitation provided in Section 16(3)(b) for complaints against carriers "based on overcharges". After referring to the District Court's refusal to treat the Commission's last reopening of the informal complaint as a nullity, thereby finding Thomson's formal complaint to have been filed within the six month period specified in Rule 25(f), the Court concluded that it could not conclude,

as a matter of law, that the Commission erred in reopening the informal complaint. The Court pointed out that the Commission had previously indicated a willingness to reopen cases on a "new fact basis" where the only new fact was a fresh argument by the complainant, and concluded that, as applied to this case, it could not conclude that the interpretation of the Commission's rule was arbitrary or clearly erroneous.

By order dated January 4, 1971, the Court of Appeals denied ACL's petition for a rehearing.

Reasons for Granting the Writ

A. The Case Presents an Important Question of Federal Law and One of First Impression Which Should Be Decided By This Court Because of Its Importance in the Administration of the Statute.

Rule 19(b) of the rules of this Court indicates that one ground for the granting of a writ of certiorari is whether a Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

In *ICC* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, this Court granted certiorari because of the importance of the question there involved in the administration of the statute. This case is the direct result of the decision of this Court in that case.

In *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697, involving three cases, this Court granted certiorari because in one "the New York Court of Appeals decided a federal question of substance not heretofore determined by this Court", and in another because "the decision of the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court".

ACL respectfully submits that the issue involved in these proceedings, like those involved in the *Coast Line* and

Brooklyn Bank cases, presents an important question of federal law involved in the administration of the statute which has not been but should be settled by this Court. ACL respectfully submits that the reasons stated, including those that follow, fully justify the exercise of the Court's discretion to grant this petition.

B. Rule 25(f) of the Commission's General Rules of Practice, Like Section 16(3)(b) of the Statute, Is Jurisdictional and Should Be Strictly Construed and Complied With.

Section 16(3)(b) of the Act requires that complaints against carriers subject thereto which seek to recover damages "not based on overcharges" be filed within two years from the time the cause of action accrues *and not after,* subject to the provisions of a sub-division not here pertinent. Section 16(3)(g) of the Act expressly states that the term "overcharges" as used in that section shall be deemed to mean charges for transportation services "in excess of those applicbale thereto under the tariffs lawfully on file with the Commission". Section 17 of the Act deals with Commission procedures, and Paragraph 3 thereof authorizes the Commission from time to time to make or amend such "general rules" or orders as may be requisite for the order and regulation of proceedings before it. Under that authority the Commission publishes *General Rules of Practice Before the Commission,* including Rule 25 which provides for the filing of informal complaints and, more specifically, Paragraphs (e) and (f) thereof, which relate to "special docket proceedings" and the "six months rule", respectively.

In *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667, this Court held that under Section 16(3)(b) of the statute, "the lapse of time not only bars the remedy but destroys the liability". In *Louisville Cement Co.* v. *Int. Com. Comm.,* 246 U. S. 638, 643, this Court held that "the two-

year provision of the act is not a mere statute of limitation but is jurisdictional,—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion". In *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87, this Court stated that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

In *Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, this Court stated:

> "Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This 'obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.' *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97." (p. 361)

and

> "* * * the section's terms, * * *, their uniformity in all the limitations, its legislative history, and its setting in a statute designed certainly as much for the shipper's as for the carrier's benefit and in so many respects to avoid discriminatory practices and effects, all point to uniform construction of the limitations im-

> posed. And this, we think, is the effect of the decisions which have construed them or predecessor provisions." (p. 363)

and

> "The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished." (p. 364)

See also *Brooklyn Bank* v. *O'Neil, supra,* pages 705-706.

In *Mississippi River Fuel Corp.* v. *Federal Power Com'n,* 163 F. 2d 433, the Court of Appeals, District of Columbia, concluded:

> "When the Commission announces principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces." (p. 449)

Rule 25(f) of the Commission's *General Rules of Practice Before the Commission,* the so-called "six months rule", can hardly be called a "general" rule. It is not a hypertechnical rule or a mere matter of housekeeping. Contrary to the rules in question in *American Farm Lines* v. *Black Ball Freight Service,* 396 U. S. 884, which this Court stated "unlike some of our own, do not involve 'jurisdictional' problems", Rule 25(f) is jurisdictional and does involve "jurisdictional problems". Like Section 16(3)(b), it is crystal clear. It goes to the heart of the statute of limitations and the jurisdiction of the Commission. It specifically provides for the resubmission of an informal complaint *only* upon "an additional fact basis". It further provides that "if the matter is not so submitted, * * * complainant will be deemed to have abandoned the complaint". Not only Section 16(3)(b) but Rule 25(f) as well should be strictly construed. If its provi-

sions are not fully and strictly complied with, the Commission loses the jurisdiction it otherwise would have had. In this particular instance, the Commission blatantly disregarded its own rule, thus unlawfully extending the statutory period of limitation, and the decision of the Court below erred in concluding that the Commission's interpretation of its own rule is not arbitrary or erroneous.

C. The Circuit Court Erred as to Matters of Fact and of Law.

The decision below confirms the decision of the District Court in which in effect every finding of fact and conclusion of law was the exact opposite of those made by the Florida District Court (213 F. Supp. 199), and particularly those relating to the statute of limitations and Rule 25(f) of the Commission's Rules of Practice, incredible as that seems. The findings of fact and conclusions of law reached by the Florida District Court were not appealed from; the Commission's appeal was solely on the narrow issue of the Florida Court's jurisdiction, and, but for the decision of this Court in the *Atlantic Coast Line* case, 383 U. S. 576, would have been conclusive of the issue here involved.

1. *The Record Lacks Substantial Evidence to Support the Commission's Findings and Orders.*

The opinion of the Circuit Court stated:

> "Noting that the Interstate Commerce Act invests the Commission with a broad responsibility *to police tariffs and rebates,* the District Court found substantial evidence in the record to support the Commission's decision. We cannot say this conclusion is clearly erroneous within the meaning of Fed. R. Civ. P. 52(a)." (Italics added)

In its initial decision the District Court stated:

> "After giving due weight to the Commission's authority to reverse the Examiner, this Court is forced to

> conclude that the record fails *to reveal substantial evidence supporting the Commission's reversal and contrary conclusions.* It may be that the Commission's reversal is supported by evidence to the effect that the 1950 compromise was limited to specific shipments so that the claims relating to shipments subsequent to April 7, 1945, survived. If so, *such evidence is not in the record before us.*" (Italics added)

ACL respectfully submits that the unreported opinion referred to by the Circuit Court will be searched in vain for a finding that "*there was substantial evidence in the record to support the supplemented position of the Commission.** Furthermore, a most careful reading of the *Report and Order of the Commission on Reconsideration* fails to point to *any evidence in the record* to show that the District Court was in error in concluding in its initial decision that:

> "*The record fails to reveal substantial evidence* supporting the Commission's reversal and contrary conclusions." (Italics added)

All that the Commission did in its report on remand was to outline what the District Court referred to as "the reasons stated by the Commission".

It is well established that the function of a reviewing court is to hear and determine questions before it solely on the record made before the Commission. *Radio Corp. of America* v. *United States,* 95 F. Supp. 660. 669 (1950). Judicial review of an administrative order must be based *solely upon the record made before the agency. Judiciary and Judicial Procedure,* Section 2347, 28 U.S.C.A. § 2347; *Wilson & Co.* v. *United States,* 335 F. 2d 788, 799 (1964). As this Court stated in *Universal Camera Corp.* v. *Labor Bd.,* 340 U. S. 474, 477, substantial evidence is more than a

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* Italics added.

mere scintilla. It means such *relevant evidence* as a reasonable mind might accept as adequate to support a conclusion.

In the light of those principles, based upon the District Court's initial conclusion alone that "the record fails to reveal substantial evidence supporting the Commission's reversal and contrary conclusion", the District Court should have granted ACL's first motion for summary judgment and, like the Florida District Court, annulled and set aside the Commission orders. Having failed to do so, it was error for the Court of Appeals not to have done so.

Furthermore, in *Montana-Dakota Utilities Co.* v. *Federal Power Comm.*, 169 F. 2d 392 (1948), the Second Circuit itself stated:

> "the findings of an administrative agency are not to be tested by Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c, *United States* v. *Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525."

The simple fact of the matter is that the proceedings before the Commission did not involve in any way the Commission's "broad responsibility to police tariffs and rebates". The only issue sought to be reviewed was whether or not the rates and charges assailed in the complaint were barred from consideration by the Commission under the provisions of Section 16(3)(b) of the Act and Rule 25(f) of the Commission's own Rules of Practice.

ACL respectfully submits that it was error for the Court of Appeals not to have reversed the District Court.

2. *The Circuit Court Erred in Its Decision with Respect to the Statute of Limitations and Rule 25(f) of the Commission's Rules of Practice.*

In dealing with the statute of limitations and Rule 25(f) of the Commission's own Rules of Practice, the Second

Circuit opinion states that

> "Although ACL points to several instances when it asserts that Thomson's claim expired under the statute, the most important contention concerns the closing of Thomson's informal complaint in March, 1956, and the delay of more than six months until October 16, 1956, in the filing of a formal complaint."

ACL emphatically disagrees with that statement by the Court. They consider prior "closings" and "reopenings" by the Commission's staff equally important and worthy of consideration not accorded by the Circuit Court,—for example, the "closing" on June 26, 1952, and the "reopening" on December 24, 1952. Dealing with ACL's attack upon the latter reopening of the informal complaint because there was no "additional fact basis" for such action as required by Rule 25(f), the Court states that the "additional fact basis" upon which the informal complaint was reopened was that Thomson had filed a formal complaint (Docket No. 31124), seeking reparation on shipments to five destinations "previously involved in the informal complaint". The Court thereupon concluded:

> "Pendency of a formal complaint constitutes a sufficient basis to reopen because resolution of the issues in a formal proceeding will usually result in settlement of an informal proceeding involving substantially similar issues."

citing two Commission decisions decided in 1932 and 1937 *prior* to the addition of the phrase "on an additional fact basis" in 1942. Both cases cited involved *different* complainants, not the same complainant as in this case. Moreover, in *Brandeis, Goldschmidt & Co., Inc.* v. *The Baltimore and Ohio Railroad Company, et al.,* Docket No. 34436, decided August 27, 1965, (mimeographed and not reported) *after* the addition of the phrase "on an additional fact

basis'' in 1942, the Commission stated that ''complainant's reference to such pending proceeding did not present any 'additional fact basis' as required by Rule 1.25(f)''.

The simple fact of the matter is that a single informal complaint, raising but one issue, has been permitted by the Commission and the lower Courts to be used as the basis for three separate proceedings, a ''negotiated'' settlement between ACL and Thomson in 1950, a formal complaint filed in 1952 (Docket No. 31124), and another formal complaint filed in 1956, the one here under review. Contrary to the conclusion of the lower Courts, the Commission's staff clearly abused its descretion in determining that there ''was a reasonable possibility that further attempt at informal adjustment may be successful''. After its special docket ''negotiated'' settlement in 1950, ACL steadfastly refused to agree to any other informal adjustment.

After quoting Rule 25(f) of the Commission's Rules of Practice, the Circuit Court *erroneously* states that the rule tolls the running of the two year statute of limitations provided by 49 U.S.C.A. § 16(3)(b) for complaints against carriers *based on overcharges.* Section 16(3)(b) expressly relates to complaints against carriers *not based on overcharges.*

Pointing out that the District Court refused to treat the Commission's reopening from April 4th to April 19th as a nullity, and thereby found Thomson's formal complaint to have been filed within the six month period specified by the Commission's Rule 25(f), the Circuit Court stated

> ''We cannot conclude, as a matter of law, that the Commision erred in reopening the informal complaint.''

apparently because

> ''The purpose of the informal docket is *to facilitate negotiated settlements between shippers and carriers* at less expense than formal litigation.'' (Italics added)

It need only be pointed out that in order to dispose of the informal complaint ACL *had* "negotiated" a settlement with Thomson that resulted in the 1950 special docket award, and that it had thereafter steadfastly refused to make any further informal "settlement" of the same informal complaint.

The Second Circuit opinion then states:

> "While ACL contends 'there is not the slightest doubt as to the meaning of the words "on an additional fact basis," ' the words must be construed in the context of a regulatory scheme which seeks to avoid the heavy burden of litigation where there is a reasonable possibility of negotiated settlement. The Commission has previously indicated a willingness to reopen cases on a 'new fact basis' where the only new fact is a fresh argument by the complainant. See *Southland Company* v. *Southern Ry. Co.*, 300 I.C.C. 9 (Dec. 2, 1957)."

It thereupon stated that "As applied to this case, we cannot conclude that this interpretation of the Commission's rule is arbitrary or clearly erroneous.[2]"

Contrary to the statement just quoted, the "new fact basis" on which the Commission reopened the *Southland* case was not "a fresh argument". The report of the Commission in that proceeding clearly states:

> "This informal complaint was closed on May 20, 1955, but was subsequently reopened on October 14, 1955, when resubmitted by letter of September 5, 1955, *on an additional fact basis.* The informal docket was closed on November 4, 1955, as not being susceptible of informal adjustment. The defendants argue that the complainant's letter of September 9, 1955, did not contain sufficient facts to justify reopening the informal complaint for further consideration. The facts bearing upon this contention are discussed below."

* * * * * *

By letter of September 9, 1955, the complainant called attention to *factual and tariff differences* between the instant situation and that in *A. E West Petroleum Co.*, v. *Atchison, T. & S. F. Ry. Co., supra,* and asked that the matter be resubmitted to the defendants. Thereupon, the informal complaint was reopened and the *new* statements of the complainant were referred to the defendants. By letter of October 26, 1955, they declined further to consider the informal complaint. By notice mailed on November 4, 1955, the complaint was declined by us as not susceptible of informal adjustment. Upon a subsequent request that the complaint be reopened on the informal docket, the complainant was informed that the complaint remained declined as of November 4, 1955." (Italics added)

Footnote 2 of the Second Circuit Court's opinion purports to state the standard to be applied in reviewing an administrative agency's interpretation of its own rule, citing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945) and *Western Union Telegraph Co.* v. *United States,* 217 F. 2d 579 (2d Cir. 1954).

What this Court stated in the *Bowles* case was

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation *if the meaning of the words used is in doubt.* The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight *unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter.*" (pp. 413-414) (italics added)

Plainer language could not have been used. Furthermore, this Court's statement that the *legality of the result* reached by that process is the crux of the matter in this instance. The requirment for strict construction and compliance with Rule 25(f) can hardly be any more "unfair" than it would be for the Commission to hold, as it has done on a number of occasions, that a formal complaint filed one day after the expiration of the two-year statutory period was barred by the statute of limitations.

In *Western Union Telegraph Company* v. *United States,* 217 F. 2d 579 (1954), the second case cited as authority in the footnote, this very court stated:

> "The Commission's interpretation of a Formula adopted and approved by it after careful consideration—like other administrative regulations of a responsible governmental agency—is entitled to great weight *if not so unnatural or unreasonable as to ensnare and entrap* those governed by it." (p. 581) (Italics added)

In this instance there is no *formula,* only a *rule* affecting the statute of limitations specified in the statute, so clearly stated that there is not the slightest doubt as to the meaning of the words "on an additional fact basis".

In *Minneapolis R. R.* v. *Peoria Ry.,* 270 U. S. 580, 585, this Court stated that the opinion of a *commissioner* that the order there in issue was in full force despite the dismissal of the complaint was "without legal significance". In *Thomson* v. *Texas Mexican R. Co.,* 328 U. S. 134, 136, this Court stated that "the Secretary of the Commission was without authority to bind the Commission in the matter" there under consideration. In *Western Maryland Ry. Co.* v. *Commodity Credit Corp.,* 154 F. Supp. 508, that Court stated

> "Although even an informal opinion of an experienced I.C.C. official must carry some weight, it can-

not overcome the plain language of the orders and tariffs."

In the light of those statements by the courts, the several informal views expressed by the Commission's Secretary or its staff were "without legal significance", and certainly an arbitrary interpretation of Rule 25(f) could not operate to remove the bar of the statute of limitations or modify the provisions of the rule itself.

ACL respectfully submits that the Circuit Court was in error in not concluding that the Commission's staff was in error in reopening the informal complaint on one or more occasions, and that the Commission's interpretation of Rule 25(f) was arbitrary and clearly erroneous.

D. The Decision of the Court of Appeals, Upholding the Decision of the Commission with Respect to the Legal Effect of Rule 25(f), Is in Direct Conflict with Prior Commission Decisions.

Long before the words "on an additional fact basis" were added to Rule 25(f), effective on September 15, 1942, the Commission had as a matter of principle declined to reopen informal complaints where no new or additional facts were presented.

In *Domestic Coke Corp.* v. *Baltimore & O. R. Co.*, 168 I.C.C. 53, decided September 22, 1930, a case which involved former Rule III(g), the predecessor of Rule 25(f), the Commission stated:

> "It remains to determine whether complainant *abandoned* its informal complaint. * * * *Our secretary's letter of May 24, 1926, although written under a misapprehension of the requirements of Rule III(c), was a definite denial of the claim as filed.* Because of the lack therein of what were then regarded as essential elements of an informal complaint, the denial could not have been more definite. It is immaterial, as we

view it, that if the informal rejection had been justified the informal complaint would have been barred before the letter of May 24, 1926, was written. *That fact made it no less the duty of complainant to submit its claim within the six months' period specified in our Rules of Practice. Its failure to do so was an abandonment of the complaint within the meaning of those rules.* * * * *In other words, even though our secretary may have based the dismissal upon what we now find to be an erroneous conclusion concerning Rule III (c), nevertheless it was a dismissal, and cast the burden upon complainant to take additional action before the expiration of six months.*

We are not unmindful of the fact that on May 28, 1929, our secretary had informed the complainant that it had six months from February 2, 1929, within which to file a formal complaint. But at that stage of the correspondence the claim was either abandoned or was not abandoned. If it were abandoned the statement of our secretary could not operate to remove the bar. The claim was already extinguished.

We find that the formal complaint here considered was filed more than six months after the informal complaint had been 'denied on the informal docket,' and that the informal complaint had therefore been abandoned." (pp. 55-56) (Italics added.)

In *Carpenter Paper Co.* v. *Chicago & A. R. Co.*, 171 I.C.C. 783, decided January 16, 1931, the Commission found that complaint barred because a letter from the complainant requesting reopening "was not supported by any new matter which would warrant reopening", that the case was not resubmitted informally, and that "the failure to resubmit the claim within six months was an abandonment of the claim within the meaning of Rule III(g), regardless of whether or not complainant intended to abandon it", citing *Domestic Coke* v. *Baltimore & O. R. Co., supra.*

In *South Chester Tube Co.* v. *Reading Co.*, 181 I.C.C. 613, decided January 28, 1932, the Commission stated that the complainant, "without furnishing new facts in support thereof, requested that the informal proceedings there involved be reopened", and that request was denied, citing the *Carpenter* case.

As a result of administrative studies undertaken by a committee of the Commission's staff, a draft of proposed rules of practice was formulated in January, 1942. In that draft former Rule III(g) became Rule 25(d), and old Rule III(g) was copied verbatim except that the phrase "on an additional fact basis" was added. A footnote on page 22 of the draft explained what the new phrase meant.

> "*Rule 25(d).* The text is from present rule III (g). In the second sentence there has been inserted, after 'resubmitted', the phrase 'on an additional fact basis'. This is an attempt to give effect to the interpretation of rule III(g) as made in *Carpenter Paper Co.* v. *Chicago & A. R. Co.*, 171 I.C.C. 783, and *South Chester Tube Co.* v. *Reading Co.*, 181 I.C.C. 613."

The revised rule was approved on July 31, 1942, and became effective September 15, 1942.

The added phrase "on an additional fact basis" was clearly nothing more than a codification of the interpretation given former Rule III(g) in previous decisions of the Commission, and the draft proposing its addition specifically cited two of those discussed above. It is thus apparent that the words "on an additional fact basis" mean and were intended to mean on the basis of additional factual rather than argumentative matter. That such a meaning or construction of the revised rule was not used by the staff of the Commission in reopening Informal Complaint No. 174417 is undeniable.

In *Mente & Co., Inc.* v. *Central of Georgia Ry. Co.*, 296 I.C.C. 21, decided May 24, 1955, the Commission stated

that the resubmission of the informal complaint there relied upon "contained no new or additional information" which justified the reopening of the complaint, and found that formal complaint barred by the statute of limitations on the ground that the formal complaint was filed more than six months after due notice was given of the closing of the informal proceeding.

In *Atlantic Creosoting Co., Inc.* v. *Southern Ry Co.*, 323 I.C.C. 533, decided November 19, 1964, the Commission referred to Rule 25(f), stating that it merely provides means whereby the two year statutory period in Section 16(3)(b) is tolled pending informal consideration of a complaint. After stating that the procedural question raised by the complainant was whether certain letters there referred to constituted "resubmission on an additional-fact basis as required by rule 1.25(f)", the Commission concluded that the letters contained no *new or additional facts* but were merely repetitive of the original submission and thus did not constitute a resubmission. The Commission then said:

> "The Commission found under similar circumstances in *LeTourneau-Westinghouse Co.* v. *Southern Ry. Co.*, 299 I.C.C. 17, that a formal complaint filed more than six months after denial of the informal complaint was barred. A similar conclusion is warranted here." (p. 535)

In *Brandeis, Goldschmidt & Co., Inc.* v. *The Baltimore and Ohio Railroad Company, et al., supra,* the Commission stated:

> "* * * the full text of complainant's letter of September 23, 1963, upon which complainant relies is set forth in the appendix. *Even under a liberal construction of the phrase 'additional fact basis'* this letter fails to indicate any factual information relating to the shipments which are the subject of the informal

complaint. It merely referred to *a pending proceeding filed by a different complainant* against some of the defendants herein involving movement of the same commodity, but from different origins and a different destination than involved herein. While a somewhat similar issue is involved in the referred to proceeding, it is not substantially different from issues involved in the numerous cases relied upon by the complainant in the informal complaint before it was closed by the Secretary's letters of March 29, and April 23, 1963. *We agree with the hearing examiner that complainant's reference to such pending proceeding did not present any 'additional fact basis' as required by Rule 1.25(f).*

"The complainant's representative also argues that *he should have been able to rely on the letter from the chief of the Informal Cases Branch that the proceeding was reopened;* and that he would have had time to file a formal complaint had he been advised that his request had been denied. However, his request was received only 3 days before the expiration of the 6-month time period with respect to 118 of the 127 shipments. Whether prompt denial of the request would have afforded complainant sufficient time to file a formal complaint with respect to the 118 shipments, while doubtful, is immaterial. The reopening was a nullity because it was without legal foundation as complainant's request did not comply with Commission's Rule 1.25(f)." (pp. 5-6) (italics added)

The Commission thereupon found that

"the formal complaint under consideration was not filed within the time provided by Section 16(3)(b) of the Act and Rule 1.25(f) of the Commission's General Rules of Practice, and thus is barred from our consideration."

E. The Decision Below Permits the Exercise of Discrimination, Preference and Prejudice by the Commission and Its Staff in the Application of Rule 25(f).

The undeniable effect of the decision by the Second Circuit is to permit the Commission or its staff in the exercise of "its discretion" or "liberal" construction or "interpretation" of Rule 25(f) to discriminate, prefer or prejudice individual complainants before it. In the present instance, as previously cited decisions of the Commission indicate, the Commission has, with the approval of the Second Circuit, discriminated in favor of and preferred *Thomson* by its "liberal" interpretation of Rule 25(f), and prejudiced *Domestic Coke, Carpenter Paper, South Chester Tube Co., Mente, Atlantic Creosoting Co.,* and *Brandeis, Goldschmidt & Co.,* by its strict or literal construction of the same rule, as heretofore shown by the discussion of those cases.

In *Union Pacific R. Co.* v. *U. S.,* 313 U. S. 450, this Court stated with respect to the Interstate Commerce Act:

> "In fact, favoritism which destroys equality between shippers, however brought about, is not tolerated." (p. 462)

In *New York* v. *United States,* 331 U. S. 284, this Court stated:

> "The principal evil at which the Interstate Commerce act was aimed was discrimination in its various manifestations."

In *United States* v. *B. & O. R. Co.,* 333 U. S. 169, this Court stated:

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all

types, *New York* v. *United States*, 331 U. S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616."

If the stringent principles cited above by this Court require the Commission to apply them in its administration of the Act to those regulated thereby, it certainly must follow that they require the Commission, as the administrator and regulator under the Act, to refrain from observing or permitting any discrimination, preference or prejudice by its staff or itself in the administration of the statute and its own General Rules of Practice Before the Commission.

F. The appropriateness of certiorari.

Prior to the Circuit Court's opinion, affirming the decisions of the District Court, the phrase "on an additional fact basis" in Rule 25(f) of the Commission's Rules of Practice was construed and interpreted by the Commission and its staff to mean exactly what it said, and strict compliance with its provisions was necessary to prevent the running of the statute of limitations of the Act. ACL believes that the impact of the lower courts' acceptance of the Commission's "liberal" rather than "literal" construction or interpretation of its own rule in this instance will be so far reaching in its ultimate effect on the statute of limitations, is so completely irreconcilable with this Court's findings of years standing that the two year provision of the Act is not a mere statute of limitations but is jurisdictional, and that the lapse of time not only bars the remedy but destroys the liability, and that the issue involved is among the most important issues involving the Interstate Commerce Act, including its statute of limitations, presented to this Court for determination. By refusing to require strict application of the provisions of Rule 25(f) with respect to the reopening of informal com-

plaints, ACL firmly believes that the decisions of the lower courts will make a mockery of and for all practical purposes nullify the statute of limitations in Section 16(3)(b) of the statute.

CONCLUSION

For the foregoing reasons, ACL prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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